OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, PIRS

FROM: Associate General Counsel, Litigation Division

SUBJECT: Advanced Cordless Technologies, Inc. v. FCC & USA, No. 95-10656. Filing of one new Petition for Review filed in the United States Court of Appeals for the District of Columbia Circuit.

DATE: February 27, 1995

Docket No(s). GEN Docket No. 90-314

File No (s).

This is to advise you that Advanced Cordless Technology, Inc., on January 25, 1995, filed Section 402(a) Petitions for Review of: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 94-304, released December 2, 1994.

Petitioner challenges the Commission's decision reaffirming its denial of petitioner's application for a PCS pioneer's preference.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as Nos. 95-1065 and this case has been assigned to James Carr.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Advanced Cordless Technologies, Inc.,	)	
Petitioner,	)	
v.	)	No. 95-1083
Federal Communications Commission and the United States of America,	)	
Respondents.	)	

PETITION FOR REVIEW

Pursuant to 47 U.S.C. §402(a), Rule 15 of the Federal Rules of Appellate Procedure and Rule 15 of the rules of this Court, Advanced Cordless Technologies, Inc. ("petitioner" or "ACT") petitions this Court to review the action of the Federal Communications Commission ("respondent" or "FCC") by Memorandum Opinion and Order released December 2, 1994, FCC 94-304 (copy attached as appendix A).

I.

Nature of proceedings below

The proceedings below and this petition relate to an award by the FCC of valuable frequency rights in the information highway program known as "personal communications services" ("PCS") to three parties because of their alleged pioneering efforts with regard to PCS, and the denial of such a pioneering award to the petitioner. The three awardees are American PCS, L.P. of which The Washington Post Company was until recently 70% equity holder ("APC-Post"), Cox Enterprises, Inc. ("Cox") and Omnipoint Communications, Inc. ("Omnipoint").

When the awards were granted as a final matter by the FCC,

the petitioner, in early March 1994, filed a petition for reconsideration, asserting its own merits for an award and raising allegations that APC-Post, Cox and Omnipoint had engaged in unlawful ex parte contacts which contaminated the award process. The FCC did not act on the petitioner's allegations although there were pressing deadlines to resolve the matter because of a Congressionally-mandated obligation to commence auctions of PCS frequencies beginning in December 1994. Even after this Court put pressure on the FCC to do so, it declined to give an estimated timetable in a brief document that referred to the complexity of the matter even though the FCC had issued a remand decision modifying the awards to the three recipients in a period of 14 calendar days only a few months earlier. Order of this Court filed September 26, 1994 and two-page FCC response filed September 27, 1994 in American Personal Communications v. FCC, No. 94-1549.

The FCC failed to advise the Court that, at the very time of this exchange, the Executive Branch in concert with the Congress had agreed to "untrack" major legislation relative to international trade and tariffs to include a rider amending the Communications Act that codified the FCC awards to APC-Post, Cox and Omnipoint and commmanded the agency and this Court not to consider the ex parte allegations that had been raised in the appellant's petition. This having been done, the GATT legislation was restored to its "fast track," impervious to further amendment, individual debate on the rider or individual

vote on the rider. [1]

The GATT rider had nothing to do with international trade or tariffs and obviously was inconsequential to the up-or-down debate and vote in Congress. The only nexus of the rider to the GATT legislation was that the proponents of the legislation included funds to be raised by the sale of the frequencies to the three awardees (at 15% discounted prices with an aggregate floor of $400 million specified in the rider) in the economic analysis of the impact of the legislation. However, the same amount of funds would have been raised if the rider specified the 15% discounted prices and aggregate $400 million floor for pioneer award recipients of the frequencies, whoever they might be. Accordingly, the provision mandating that the awards to these three parties be forever protected from agency or court review was entirely gratuitous, admitting of no reasoned explanation other than the desire to do an enormous financial favor for these parties, for reasons known only to the participants in this behind-the-scenes process, whoever they might be.

While the FCC stonewalled action on ACT's petition for

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[1] The rider is Title VIII of the Uruguay Round Agreements Act of 1994, approved by the House of Representatives on November 29, 1994, approved by the Senate on December 1, 1994 and signed by the President on December 8, 1994. This legislation reportedly was some seven years in the making, related to the General Agreement on Tariffs and Trade ("GATT") and involved ongoing negotiations with many foreign nations. It was placed on the "fast track" by which it could not be amended without the concurrence of the Executive Branch and the Congress to permit the Executive Branch to conduct those ongoing negotiations with knowledge of the terms of the legislation that would be debated and voted by Congress strictly on an up-or-down basis without alterations.

agency's mens rea not granting an award to the petitioner which played by the rules and did no unlawful lobbying whatever. While the choices among the four of them are not literally mutually exclusive, the contamination of the agency's mens rea is mutually applicable to all four. The petitioner's allegations and evidence of that contamination have never been addressed by the agency.

The alleged contaminating effect of the mens rea adverse to the petitioner is made clear from the brief passage in Appendix A denying the petition for reconsideration relative to ACT's award on the ground that ACT did not file a timely petition for reconsideration which the FCC states was due in or about September 1993. Appendix A is silent regarding the extenuating circumstances including ACT's timely petition for reconsideration of denial of its award which had been filed in November 1992, nearly a year earlier, and was never acted on by the agency, which, in fact, twice denied its very existence. These and other extenuating circumstances were set forth in the petition for reconsideration of the Third Report and Order, and have never been addressed by the agency either.

B.
Violation of implied separation of powers under Articles I and III of the Constitution

The petitioner will argue that the GATT rider's ossification of the award of valuable frequency rights to APC-Post, Cox and Omnipoint, without consideration of allegations that those awards were secured by unlawful means, violates the implied separation

of powers under Articles I and III of the Constitution in that the Congress has usurped the function of the judiciary to decide cases and controversies.

C.
Violation of implied separation of powers and the due process clause of the Fifth Amendment of the Constitution

The petitioner will argue that the GATT rider's ossification of the award of valuable frequency rights to APC-Post, Cox and Omnipoint, without consideration of allegations that those awards were secured by unlawful means, violates the implied separation of powers under Articles I and III, and the Fifth Amendment, of the Constitution in that the petitioner has been deprived of review of that agency action by an Article III court.

D.
Violation of the Fifth Amendment of the Constitution and the Administrative Procedure Act

The petitioner will argue that unlawful ex parte contacts by APC-Post, Cox and Omnipoint have contaminated the agency process by which valuable frequency rights were awarded to them and valuable frequency rights were denied to the petitioner in violation of the due process clause of the Fifth Amendment of the Constitution and in violation of the requirements of the Administrative Procedure Act that the proceedings by which these awards were granted or denied must have been made on the basis of the public record.

E.
Ex parte contacts of the agency

The petitioner will argue there is compelling evidence that the awards of valuable frequency rights to APC-Post, Cox and

Omnipoint were contaminated by massive numbers of unexplained, unexplainable and unlawful ex parte contacts of the agency. We have previously provided many of the details to this Court in our brief for ACT as amicus curiae filed June 17, 1994 in Pacific Bell v. FCC, Case No. 94-1148 (case subsequently remanded to the FCC at its request).

F.

The hiring of FCC of a key official by the Washington Post

The petitioner will argue there is further evidence of ex parte wrongdoing in the hiring of the top legal assistant of an FCC Commissioner by the Washington Post at the time that top legal assistant was subjected to an ex parte contact having a direct bearing on APC-Post's request for the pioneer's award and while the matter of finalizing that award was pending before the agency.

G.

Securing the GATT rider to preclude lawful inquiry

The petitioner will argue that there is further relevant evidence bearing on the ex parte wrongdoing in the securing of the GATT rider. That rider, with the totally gratuitous largess to APC-Post, Cox and Omnipoint, required the support of the Executive Branch and the Congress. The Washington Post, we may presume, is not without friends in both places. Counsel for Omnipoint and a consortium, PCS Action, Inc., that included all three parties served as the Clinton administration's transition advisor for communciations and has reportedly been unabashed in his efforts to secure PCS favors. The FCC Chairman, whose

appointment stemmed from his relationships with the Vice President and who supposedly recused himself from this matter, nonetheless entertained contacts by representatives of APC-Post shortly before the final vote on the awards and subsequently during the lengthy period when the text of that decision was being drafted. All three parties are served by professional lobbyists including one whose brother is on the White House staff in a position of importance.

Throughout the lobbying process in Congress, the FCC cooperated by stonewalling action on ACT's petition for reconsideration for nearly a year notwithstanding the urgency imposed by the December 1994 deadline to commence auctions and the pressure for action from this Court. Someone had to be in communication with someone about all of this. Yet, the ex parte restrictions at all times have been in effect and will continue in effect until all court appeals are exhausted. 47 C.F.R. §1.1208(a).

While lobbying for legislation is not unlawful, of course, the lobbying efforts, particularly those of which the agency had any knowledge or in which the agency participated in any way, are relevant here when the ex parte restrictions remained in place and the legislation contains a totally unnecessary and unique private bill mandating that allegations of wrongdoing in decision-making at the FCC can never be examined either by the agency or by any court.

H.
Need for independent evidentiary inquiry
with full discovery and hearing procedures

The petitioner will argue that in contrast to other ex parte cases that have come before this Court, the matters should not be remanded to the agency for further proceedings such as those specified in Sangamon Valley Television Corp. v. U.S., 269 F.2d 221, 225 (D.C.Cir. 1959) and in Home Box Office, Inc. v. FCC, 567 F.2d 9, 51-59 (D.C.Cir.), cert. denied, 434 U.S. 829 (1977). In addition to massive ex parte contacts at the very top levels of the agency, the instant case involves the unique facts and circumstances that the parties went to Congress to obtain legislation that would forever immunize the alleged unlawful conduct of all concerned -- private and government -- from scrutiny in any forum. That behind-the-scenes conduct, as well as the behind-the-scenes conduct at the agency itself, involving hundreds of documents and scores of fact witnesses, should be the subject of full discovery and hearing proceedings before an impartial tribunal having no actual or apparent conflict of interest as the FCC most surely has.

III.
Petitioner's complaint in federal district court

This petition for review is filed as a protective matter. The petitioner is currently the plaintiff in an action against the FCC, the United States of America and the three award winners in the United States District Court for the District of Columbia before Judge Norma Holloway Johnson seeking declaratory, injunctive and other relief. Civil Action No. 1:94CV02315. Our

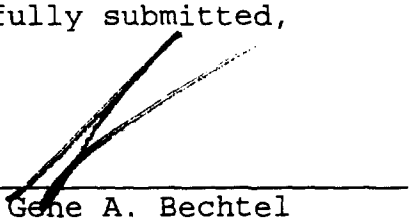
basis for jurisdiction is that the FCC's action granting the awards to APC-Post, Cox and Omnipoint, as ossified by the GATT legislation, is not a final order of the agency, which has never passed on the appellant's allegations of wrongdoing. For that reason, we assert, the federal appellate court exclusive jurisdiction under 28 U.S.C. §2342 does not govern and a federal district court has jurisdiction to try constitutional law claims under 28 U.S.C. §1331.

Our strategy reason for bringing suit in the federal district court is the recognition that this case requires a major discovery effort and courtroom trial where the performance and the testimony of the fact witnesses will be most important in getting to the truth of the matter. These witnesses will be questioned regarding an unlawful concert of lobbying, and acquiescence in that lobbying by government officials, which is unlikely to be freely admitted by the co-participants. Following the trial of the case and the development of a full and independent record and decision by the federal district court, the matter will then be available for review on appeal to this Court.

All defendants have filed motions to dismiss our federal district court action for lack of jurisdiction. If Judge Johnson denies the motions, the petitioner intends to seek leave to dismiss this petition for review and will pursue its rights and remedies in the local District Court, subject ultimately, of course, to review here. If Judge Johnson grants the motions to

dismiss, the petitioner intends to pursue its rights and remedies directly in this Court by virtue of the instant petition for review. Either way, the appellant does not propose to pursue simultaneous litigation of the merits of its cause both before Judge Johnson in the local District Court and this Court of Appeals in light of precedent discouraging such simultaneous litigation by the same party. Whitney Natl. Bank v. Bank of New Orleans, 379 U.S. 411 (1975); City of Rochester v. Bond, 603 F.2d 927, 931 (D.C.Cir. 1979).

Respectfully submitted,



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